RECENT DECISIONS.

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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—VALIDITY—HINDERING AND DELAYING CREDITORS.—An insolvent debtor, acting in good faith, assigned all his property to the plaintiff for the benefit of his creditors, without restriction or preference. The plaintiff now sues to recover such of the property as was thereafter seized by the defendant in execution of a judgment against the debtor. *Held,* the plaintiff may recover. *Sabin* v. *Chrisman* (Ore. 1916) 154 Pac. 908.

In the absence of fraud, the law views with favor a voluntary assignment of the insolvent debtor's entire property for the benefit of all his creditors, see *Malcolm* v. *Hall* (Md. 1850) 9 Gill 177; *Mayer* v. *Hellman* (1875) 91 U. S. 496, and such assignments are valid even where made for debts due only in equity and good conscience. *Durant* v. *Pierson* (1891) 124 N. Y. 444, 26 N. E. 1095; *cf. Wilson* v. *Russell* (1858) 13 Md. 494, 528. Although, in the absence of statutory prohibition, the debtor is generally permitted to make preferences in his assignment, *Blair* v. *Illinois Steel Co.* (1896) 159 Ill. 350, 362, 42 N. E. 895; *Means* v. *Montgomery* (1884) 23 Fed. 421, they are tolerated rather than encouraged. See *Turnipseed* v. *Schaefer* (1886) 76 Ga. 109. The assent of the creditors is necessary to make the assignment valid against subsequent attachment, *Faulkner* v. *Hyman* (1886) 142 Mass. 53, 6 N. E. 846; see *Smith* v. *Millet* (1877) 11 R. I. 528, but such assent is presumed unless there is evidence to the contrary, if the assignment is beneficial to the creditors. See *Ewing* v. *Walker* (1895) 60 Ark. 503, 31 S. W. 45; *Fearey* v. *O'Neill* (1899) 149 Mo. 467, 50 S. W. 918. If the assignment is made with intent to hinder, delay and defraud creditors, it is void by the Statute of Fraudulent Conveyances, 13 Eliz. c. 5, which has passed with the common law into all our states. Glenn, Creditors' Rights and Remedies, §§ 68-70. It is fraudulent *per se* if the debtor demands of the creditors a release of all debts as a condition to participating in the assignment, see 14 Columbia Law Rev., 528, or reserves some benefit to himself. *Montgomery* v. *Goodbar & Co.* (1891) 69 Miss. 333, 13 So. 624. But where, as in the principal case, the debtor in good faith assigns all his property without reservation or preference for the benefit of all his creditors, the assignment is valid even though the necessary result is to hinder and delay creditors in enforcing their claims through an action at law. *Hoffman, Burneston & Co.* v. *Mackall* (1855) 5 Ohio St. 124; 1 Freeman, Executions (3rd ed.) § 146.

ATTACHMENT—DEATH OF DEFENDANT—EFFECT.—The widow and heirs-at-law of an intestate whose real property was attached in his lifetime claim that the attachment was dissolved by his death. *Held,* under the Iowa statutes providing that actions shall survive the death of the defendant, the attachment was not dissolved thereby. *Tetzloff* v. *May* (Iowa 1915) 154 N. W. 905.

At common law, when the death of the defendant before judgment abated an action, it also dissolved attachments incidental thereto, *Reynolds* v. *Nesbitt* (1900) 196 Pa. 636, 46 Atl. 841; *Sweringen* v. *Admr. of Eberius* (1842) 7 Mo. 421; *Dwyer* v.

Benedict (1879) 12 R. I. 459,—a rule that applied also to corporations defendant which became civilly dead by dissolution while the action was pending; *Farmers' & Mechanics' Bank* v. *Little* (Pa. 1844) 8 Watts & Serg. 207, 220; see *Morgan* v. *New York Nat. Bldg. & Loan Assn.* (1900) 73 Conn. 151, 46 N. E. 877; but the death of the defendant after judgment, though before execution, had no effect on the attachment. *Fitch* v. *Ross* (Pa. 1818) 4 Serg. & Raw. *557; see *Cunningham* v. *Burk* (1885) 45 Ark. 267. Where, however, the action may be continued against the personal representative of the defendant, it has been held that the attachment is dissolved as to realty, since, if a judgment were obtained, it would be against the executor or administrator and could not be satisfied out of the real estate attached unless it were shown that the personalty was insufficient. *Phillips* v. *Ash's Heirs & Admrs.* (1879) 63 Ala. 414; *Vaughn* v. *Sturtevant* (1863) 7 R. I. 372; but see *Perkins' Heirs* v. *Norvell* (1845) 25 Tenn. 151. But in some jurisdictions the statutes as to the survival of actions are so liberal as impliedly to justify the continuance of the attachment, *Don* v. *Blake* (1893) 148 Ill. 76, 89, 35 N. E. 761, in which case the execution may be satisfied directly out of the property attached. *Mitchell* v. *Schoonover* (1888) 16 Ore. 211; *Frellson* v. *Green* (1858) 19 Ark. *376. Although the question has apparently not come before the New York Court of Appeals, it has been held in the Supreme Court that what is now § 416 Code Civ. Proc., giving the court jurisdiction and control of all the subsequent proceedings in an action from the time of granting a provisional remedy, taken in connection with what is now § 757, providing for continuance of action after death of a party by or against his personal representative, preserves the attachment after the death of the defendant. *Thacher* v. *Bancroft* (N. Y. 1862) 15 Abb. Prac. 243; *More* v. *Thayer* (N. Y. 1850) 10 Barb. 258; *cf.* dissenting opinion in *Aetna Nat. Bank* v. *Kramer* (1911) 142 App. Div. 444, 447, 126 N. Y. Supp. 970.

CARRIERS—LIMITATION OF LIABILITY—THEFT BY EMPLOYEE.—The plaintiff shipped goods under a bill of lading which provided that unless a greater value was declared, and a correspondingly higher rate paid, the company should not be liable for more than $50.00 in any event. The goods were stolen by an employee of the carrier and the plaintiff brought suit for the full value. *Held,* the limitation of liability extends to such a case and the company is only liable to the extent of $50.00, the plaintiff not having declared a greater value. *D'Utassy* v. *Barret* (App. Div., 1st Dept., 1916) 157 N. Y. Supp. 916.

Stipulations as to the value of property in a contract of shipment, if fairly made, and in consideration of a lower rate, preclude the shipper from showing that the actual value of the article shipped was greater than that declared at the time of fixing the rate for carriage. *Hart* v. *Pennsylvania R. R.* (1884) 112 U. S. 331, 340, 5 Sup. Ct. 151, 155; *Adams Exp. Co.* v. *Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148. This limitation of responsibility, however, can not be invoked by the carrier where it has misdelivered, converted to its own use, or carried the property over the wrong route. *Southern Ry.* v. *Webb* (1905) 143 Ala. 304, 39 So. 262; *Shelton* v. *Canadian Northern Ry.* (C. C. 1911) 189 Fed. 153; *cf. Sleat V. Fagg* (1822) 5 Barn. & Ald. 342; Hutchinson, Carriers (3rd ed.) 518 n. 23, § 480. Some courts have reached a conclusion contrary to the holding in the principal case on the ground that a limitation protecting against the theft or

conversion by the carrier's servants would be against public policy. *Adams Exp. Co.* v. *Berry & Whitmore Co.* (1910) 35 App. D. C. 208; see *The New England* (D. C. 1901) 110 Fed. 415; *cf. Southern Exp. Co.* v. *Gutman* (1885) 6 Ky. L. Rep. 587; s. c., *ibid,* 654. As the liability in such a case would not seem to be based on the law of agency, but on the extraordinary liability imposed on carriers, there seems to be no infraction of any rule or policy in allowing the carrier the benefit of the stipulation.

CARRIERS—WHEN LIABILITY AS WAREHOUSEMAN BEGINS.—The plaintiff shipped a carload of onions over the defendant's railroad and drew a sight draft with bill of lading attached upon intended purchaser, retaining title in himself as shipper and consignee. Delivery to the purchaser was not effected nor was the shipper notified until fourteen days after the arrival of the goods, although by a local custom defendant should have notified plaintiff of failure to deliver within forty-eight hours after arrival. *Held,* the defendant, not having assumed the position of warehouseman, remained liable as carrier. *South Deerfield Onion Storage Co.* v. *New York, N. H. & H. R. R.* (Mass. 1916) 111 N. E. 367.

There is an irreconcilable conflict among authorities as to when a carrier's liability in respect to goods awaiting delivery is reduced to that of warehouseman. In some jurisdictions the liability of a common carrier as carrier ends when the consignee has had a reasonable opportunity to remove the goods, he being presumed to know the time of their arrival. *Moses* v. *Boston & Me. R. R.* (1856) 32 N. H. 523; see *Backhous* v. *Chicago & N. W. Ry.* (1896) 92 Wis. 393, 66 N. W. 400. The rule representing the weight of authority, however, is that the carrier must give such notice as is practicable to the consignee of the arrival of the goods and allow a reasonable time thereafter for removal. *Fenner* v. *Buffalo & St. L. R. R.* (1871) 44 N. Y. 505; *Railroad Co.* v. *Hatch* (1895) 52 Ohio 408. In a few jurisdictions, including that of the principal case, as soon as the goods have arrived at their destination and have been unloaded the duty as carrier ends, *Rice* v. *Hart* (1875) 118 Mass. 201; *Almand* v. *Georgia R. R. & Banking Co.* (1895) 95 Ga. 775, 21 S. E. 674, except where there has been a delay in their arrival, in which case the Missouri courts hold that the consignee is entitled to notice. *Frank* v. *Grand Tower & C. Ry.* (1894) 57 Mo. App. 181. A duty on the part of the carrier to give notice to the consignee or shipper may be imposed by contract between the parties, or by a usage or custom at the place of delivery. 4 Elliott, Railroads (2nd ed.) 264; Lawson, Usages and Customs § 96; *Almand* v. *Georgia R. R. & Banking Co., supra.* Since in the principal case a custom was proved whereby plaintiff was entitled to notice within forty-eight hours, which was not given, it would seem that the court was correct in holding the carrier liable as insurer.

CHOSES IN ACTION—INSURANCE POLICY—SITUS.—Complainant took out a policy of insurance on his life and assigned the same to his mother. After the death of his mother he brought a bill to reform the assignment as indorsed on the policy, claiming that the actual agreement was that in case his mother predeceased him, the policy was to revert to him. Non-resident distributees of the mother were served by publication. *Held,* two justices dissenting, the proceedings were *quasi in rem,* the *res* being the claim against the insurance company; by having

the insurance company before it through service on its accredited agent in the state, the court had control of the *res* and could, therefore, settle the status and rights of the parties with respect to the policy, and the substituted service on non-resident defendants was valid and sufficient notice of the nature of the suit. *Perry* v. *Young* (Tenn. 1916) 118 S. W. 577. See Notes, p. 414.

CONFESSIONS—ADMISSIBILITY—PLEA OF GUILTY.—An information was filed against the defendant for assault with intent to kill. The accused entered a plea of guilty to the information, which plea was later withdrawn by leave of the court, and a plea of not guilty entered. Upon the trial of the defendant on the same information the state was permitted to prove from the record the former plea of guilty. *Held,* no error. *State* v. *Carta* (Conn. 1916) 96 Atl. 411.

The admission in evidence of a former plea of guilty before a committing magistrate is generally upheld on the ground that it is a voluntary confession. *State* v. *Blay* (1904) 77 Vt. 56, 58 Atl. 794; *State* v. *Hand* (1904) 71 N. J. L. 137, 58 Atl. 641; *Rice* v. *State* (1887) 22 Tex. App. 654, 3 S. W. 791. It is not material that the magistrate receiving the plea of guilty omitted to caution the accused or advise him of his rights, *State* v. *Hand, supra*; see *State* v. *Briggs* (1886) 68 Iowa 416, 27 N. W. 358; but see *McNish* v. *State* (1903) 45 Fla. 83, 34 So. 219; *cf. Green* v. *State* (1898) 40 Fla. 474, 24 So. 537, or that the justice had no power to receive the plea, *People* v. *Gould* (1888) 70 Mich. 240, 38 N. W. 232, or even that no formal plea is required to a preliminary information. *State* v. *Briggs, supra.* Where the court in its discretion refuses to receive a plea of guilty or a special plea in bar, that plea cannot afterwards be used as evidence against the prisoner. *Commonwealth* v. *Lannan* (1866) 95 Mass. 563; *State* v. *Meyers* (1889) 99 Mo. 107, 12 S. W. 516; *cf. Abrams* v. *State* (1904) 121 Ga. 170, 48 S. E. 965. At least one jurisdiction has taken the view, which finds strong support in the dissenting opinion in the principal case, that when the court, in its discretion, permits the withdrawal of a plea of guilty, the case stands as though that plea had never been entered and it can never be used against the defendant; *People* v. *Ryan* (1890) 82 Cal. 617, 23 Pac. 121; see Wharton, Criminal Evidence (10th ed.) § 638; but by the weight of authority the plea may be admitted either on the trial of the indictment to which the defendant, as in the principal case, has entered a plea of guilty and later withdrawn it by leave of the court, *State* v. *Bringgold* (1905) 40 Wash. 12, 82 Pac. 132, or upon a retrial after a reversal of a former conviction. *Commonwealth* v. *Ervine* (1889) 38 Ky. 30. The plea is not conclusive, and it is always open to the defendant to show that though he pleaded guilty, he was not so in fact. *Murmutt* v. *State* (Tex. 1902) 67 S. W. 508.

CORPORATIONS—DE FACTO DIRECTORS—RIGHTS AGAINST RIVAL CLAIMANTS.—In the name of the corporation one board of directors sued another in tort for alleged misuse of corporate property. The persons bringing the suit, whose authority to represent the corporation was denied by the defendants, relied upon their positions as *de facto* directors. *Held,* the doctrine of *de facto* corporate officers does not apply between rival claimants for the office. *Stratton-Massachusetts Gold Mines Co.* v. *Davis* (Mass. 1916) 111 N. E. 375. See Notes, p. 404.

CORPORATIONS — FOREIGN CORPORATIONS — SERVICE OF SUMMONS — DUE PROCESS OF LAW.—A summons in an action against a foreign corporation having no property or office within the state was served upon its president, who was not in the state on any business of the corporation. *Held,* not due process under the Fourteenth Amendment to the Constitution of the United States and therefore void. *Magnola Metal Co.* v. *Savannah Supply Co.* (Sup. Ct. 1915) 157 N. Y. Supp. 355.

In this case the New York Supreme Court follows the decision of the Supreme Court of the United States in *Riverside & Dan River Cotton Mills* v. *Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579, holding such service, though made pursuant to the statute of the state, an infringement of the constitutional guaranties of due process of law, and in effect overruling the cases in the New York Court of Appeals from *Pope* v. *Terre Haute Car Mfg. Co.* (1881) 87 N. Y. 137 to *Sadler* v. *Boston & Bolivia Rubber Co.* (1911) 202 N. Y. 547, (affirming without opinion the decision in 140 App. Div. 367, 125 N. Y. Supp. 405), in which such service was upheld, despite the existing federal authority to the contrary. For a discussion of the principle involved see 7 Columbia Law Rev., 285.

COVENANTS—WARRANTY AGAINST INCUMBRANCES—RELEVY OF ASSESSMENTS.—The defendant's land was assessed for betterments. Prior to its sale to the plaintiff, the assessment was declared void. After the sale the assessment was relevied. *Held,* the defendant was not liable on his warranty against incumbrances, since mere liability to an assessment was not an incumbrance, within the meaning of the covenant, and the lien of the reassessment did not relate back to the date of the original assessment. *Armstrong* v. *Banking Trust Co.* (Kan. 1915) 153 Pac. 507.

Many jurisdictions, including Kansas, refuse to consider an assessment as an incumbrance until it becomes a lien. *Tull* v. *Royston* (1883) 30 Kan. 617, 2 Pac. 866; *Everett* v. *Marston* (1905) 186 Mo. 587, 85 S. W. 540; *Real Estate Corp.* v. *Harper* (1903) 174 N. Y. 123, 66 N. E. 660; but see *Doonan* v. *Killilea* (1914) 87 Misc. 427, 149 N. Y. Supp. 832. This rule offers an easy and practical test; but the contrary theory that "incumbrance" has a broader meaning than "lien", and that liability of property to assessment for improvements ordered or completed constitutes an incumbrance, before any lien attaches, perhaps more nearly carries out the intention of the parties. *Lafferty* v. *Milligan* (1895) 165 Pa. 534, 30 Atl. 1030; *Green* v. *Tidball* (1901) 26 Wash. 338, 67 Pac. 84, overruled by *Flajole* v. *Schulze* (1914) 80 Wash. 483, 141 Pac. 1026. The time when the lien attaches is usually fixed by statute. See *Pierse* v. *Bronnonenberg* (1907) 40 Ind. App. 662, 82 N. E. 126, and cases cited *supra.* Even assuming that mere liability to assessment does not violate the covenant, the better view is that, on reassessment, the lien relates back to the original levy, *Cadmus* v. *Fagan* (1885) 47 N. J. L. 549, unless the relevy is made under a statute enacted subsequently to the conveyance. *Maloy* v. *Holl* (1906) 190 Mass. 277, 76 N. E. 452; *cf. Barth* v. *Ward* (1901) 63 App. Div. 193, 71 N. Y. Supp. 340.

CRIMINAL LAW—BURGLARY—BREAKING OUT OF A BUILDING—NEW YORK PENAL LAW § 404 (2).—The defendant entered a building through an open door, closed it, re-opened it after committing a crime within the building and escaped through the doorway. *Held,* the defendant is

guilty of statutory burglary. *People* v. *Toland* (1916) 217 N. Y. 187, 111 N. E. 760, reversing S. C. (1915) 165 App. Div. 795, 151 N. Y. Supp. 482.

The Appellate Division laid down a very artificial test, whereby the commission by the defendant of a technical "breaking", by opening a door for purposes of exit, depended upon the agency by which the door had been closed originally. The Court of Appeals, by reversing the lower court, adopts a rule which seems to be more sound logically and better calculated to further public safety. For it seems immaterial by whom a door is closed provided it be opened by the defendant. For a criticism of the decision of the Appellate Division see 15 Columbia Law Rev., 358.

CRIMINAL LAW — EVIDENCE — PRESUMPTION — FAILURE OF ACCUSED TO TESTIFY.—The New York Code Crim. Proc. § 393 declares that the defendant may testify at his trial, but that his neglect or refusal to do so does not create any presumption against him. *Held,* improper comment by the prosecutor on the defendant's failure to testify furnishes no ground for a new trial, since the jury were instructed to disregard such comment and failure, and since it appears that the guilt of the accused was reasonably certain and his rights were not seriously invaded. *People* v. *Watson* (1916) 216 N. Y. 565, 111 N. E. 243.

A witness may refuse to testify to any facts which will tend to criminate him, but this refusal must be made at the beginning, and if he answers any questions, he is liable to be fully examined and cross-examined as to the crime charged. *Commonwealth* v. *Nichols* (1873) 114 Mass. 285. At common law a person accused of crime could not testify on his trial, *Deloohery* v. *State* (1867) 27 Ind. 521, but in all States except Georgia, statutes allowing the defendant to testify have been passed, not with the idea of protecting or assisting criminals, but to promote the discovery of truth so far as can be done without infringing the constitutional rights of the accused. See *Commonwealth* v. *Nichols, supra.* In the majority of these States, the enabling act provides that no presumption whatever shall arise from the failure of the defendant to testify. *State* v. *Cameron* (1868) 40 Vt. 555; *McCoy* v. *State* (Tex. Crim. App. 1904) 81 S. W. 46; *State* v. *Goff* (1899) 10 Kan. App. 286, 61 Pac. 680; *United States* v. *Pendergast* (C. C. 1887) 32 Fed. 198. Independently of such provisions, the courts should hold that no inference is to be drawn from such omission, as otherwise the constitutional principle that no man shall be compelled to testify against himself would have practically no effect. *Commonwealth* v. *Scott* (1877) 123 Mass. 239; see *Ruloff* v. *People* (1871) 45 N. Y. 213; *contra, State* v. *Cleaves* (1871) 59 Me. 298. But the principal case is in accord with the sound rule of practice that when the prosecutor has wrongfully commented on the defendant's silence and the court has ordered that the remarks be disregarded and instructed the jury on the law as to the silence of the accused, the error is cured and a new trial need not be granted. *People* v. *Hess* (1891) 85 Mich. 128, 48 N. W. 181; *Ruloff* v. *People, supra; State* v. *Howard* (1891) 35 S. C. 197, 14 S. E. 481.

DEEDS—CANCELATION—BREACH OF CONDITION OF SUPPORT.—Plaintiff conveyed land to her son and his wife in return for their agreement to support her for life. The wife died and the son became insane.

Plaintiff, after rejecting the tender of performance made by the committee of the son, sued for cancelation on the ground of breach of condition subsequent. *Held,* the contract of the grantees was personal and non-assignable and plaintiff was entitled to cancelation. *Huffman* v. *Rickets* (Ind. App. 1916) 111 N. E. 322. See Notes, p. 407.

DIVORCE—COLLUSION—VACATION OF DECREE.—The plaintiff, under an agreement with her husband, obtained a divorce from him in the mistaken belief that this was necessary to enable her to testify for him in a criminal action. It was further agreed that the husband was to remarry the plaintiff after the termination of the criminal proceedings. The husband, however, married another woman, and the plaintiff seeks to have the decree of divorce set aside. *Held,* the plaintiff, because of her collusion, cannot question the decree. *Henderson* v. *Henderson* (N. D. 1916) 156 N. W. 245.

It is generally recognized that where a judgment or decree of divorce is procured by fraud it may be set aside. *Olmstead* v. *Olmstead* (1889) 41 Minn. 297, 43 N. W. 67. But delay may constitute such laches as will deprive the applicant of the right to have the decree vacated. *Brigham, Petitioner* (1900) 176 Mass. 223, 57 N. E. 328; *Whittley* v. *Whittley* (N. Y. 1908) 60 Misc. 201, 111 N. Y. Supp. 1078. So also, although the fact that one of the parties has remarried does not present an insuperable obstacle to the vacation of the decree, *Olmstead* v. *Olmstead, supra,* nevertheless the courts hesitate to grant relief where an innocent third party would thus be injured. *Maher* v. *Title Guarantee and Trust Co.* (1900) 95 Ill. App. 365; *Whittley* v. *Whittley, supra.* Some jurisdictions allow a decree of divorce obtained by collusion and taken by default to be opened in order to let in a defense to the suit, *Mulkey* v. *Mulkey* (1893) 100 Cal. 91, 34 Pac. 621; *Danforth* v. *Danforth* (1883) 105 Ill. 603, and one court has gone so far as to set aside a collusive divorce, even upon the application of one of the colluding parties, because of the fraud practised upon the law and the court in obtaining such a divorce. *McDonald* v. *McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850. However, by the great weight of authority, a decree of divorce will not be vacated on the demand of a complainant who has been guilty of fraud or bad faith in obtaining the decree against a person not a party to the fraud, *Ferry* v. *Ferry* (1894) 9 Wash. 239, 37 Pac. 431; *Simons* v. *Simons* (1881) 47 Mich. 253, 10 N. W. 360, or in favor of one of the parties through whose collusion the divorce was obtained. *Karren* v. *Karren* (1902) 25 Utah 87, 69 Pac. 465; *Robinson* v. *Robinson* (1914) 77 Wash. 663, 138 Pac. 288; *Newman* v. *Newman* (1910) 27 Okl. 381, 112 Pac. 1007; *cf. Kinnier* v. *Kinnier* (N. Y. 1868) 53 Barb. 454, affd. 45 N. Y. 535.

EVIDENCE—ACTION FOR WRONGFUL DEATH—BURDEN OF PROOF WHERE SELF DEFENSE IS PLEADED.—In an action for wrongful death, the defendant pleaded self defense and introduced evidence tending to support that plea. *Held,* (three judges dissenting), since the plea was not an affirmative defence, the burden is on the plaintiff to show by a preponderance of evidence that the killing was not done in self defence. *Welch* v. *Creech* (Wash. 1915) 153 Pac. 355.

An intentional killing of a human being raises a presumption of law that it was wrongful. *Rutherford* v. *Foster* (C. C. A. 1903) 125 Fed. 187; *State* v. *Quick* (1909) 150 N. C. 820, 64 S. E. 168. If the

defendant seeks to controvert such a presumption on the ground of self defense, he pleads by way of confession and avoidance. 1 Chitty, Pleading (16th Am. Ed.) *551; *Brooks v. Haslam* (1884) 65 Cal. 421, 4 Pac. 399; *cf. Wright* v. *Union R. R.* (1900) 21 R. I. 554, 45 Atl. 548. It is generally held that the defendant must sustain such a defence by a preponderance of evidence, since the plea alleges affirmative matter. *Tucker* v. *State* (1899) 89 Md. 471, 478, 43 Atl. 778; *Rutherford* v. *Foster, supra; Brooks* v. *Haslam, supra;* see *Suell* v. *Derricott* (1909) 161 Ala. 259, 49 So. 895. The burden or necessity of establishing a case or an affirmative defence by a preponderance of evidence remains upon the same party throughout the trial, *Carroll* v. *Boston Elevated Ry.* (1909) 200 Mass. 527, 86 N. E. 793; *Supreme Tent K. of M.* v. *Stensland* (1902) 105 Ill. App. 267; see *Berger* v. *St. Louis Storage & Commission Co.* (1909) 136 Mo. App. 36, 116 S. W. 444, although the burden of going forward with the evidence to make or meet a *prima facie* case may shift from one party to the other. 2 Chamberlayne, Evidence, § 936 *et seq.*; 4 Wigmore, Evidence, § 2485 *et seq.* In the principal case, the burden of going forward with the evidence was shifted to the defendant by the presumption of wrongful death. He met that burden by introducing evidence of self defence, but, since this was affirmative matter, the defendant was not entitled to judgment unless he proved his defence by a preponderance of evidence. The prevailing opinion, in reaching a different conclusion, cannot be sustained either on principle or on authority.

EVIDENCE—DECLARATIONS SHOWING INTENTION—RESIDENCE OR DOMICIL.—In a proceeding to assess the transfer tax, the issue arose as to whether the decedent was a resident of New York or London. *Held,* declarations of the decedent were admissible on the issue. *In re Martin's Estate* (Surrogate's Ct., N. Y. Co., 1916) 157 N. Y. Supp. 474.

It is settled law that whenever the intent of a person is material to the issue, the declarations of that person evidencing his intent are relevant, and therefore admissible to prove it. See 10 Columbia Law Rev., 469. Since domicil is established not alone by an act, but by such act coupled with the intent to acquire or retain a domicil, *Matter of Newcomb* (1908) 192 N. Y. 238, 84 N. E. 950, when it becomes a question of fact whether a person has gained or lost a domicil, his declarations as to the fact will be admitted. *Viles* v. *Waltham* (1893) 157 Mass. 542, 92 N. E. 901; see *Ex parte Blumer* (1865) 27 Tex. 743. It is immaterial whether the declarant is alive or dead at the time his statements are sought to be proved, and his declarations may be testified to, *Reeder* v. *Holcomb* (1870) 105 Mass. 93, while the fact that they are self-serving and yet do not fall within the *res gesta* rule will not exclude them. *Ruckler* v. *Bolles* (C. C. A. 1897) 80 Fed. 504; see *Matter of Newcomb, supra.* Though the requirements for the admissibility of such declarations are amply satisfied under the rule admitting declarations showing intent, courts more frequently base their relevance and probative force on the *res gesta* or so-called verbal act doctrine, *Holyoke* v. *Holyoke's Estate* (1913) 110 Me. 469, 87 Atl. 40; *Matzenbaugh* v. *People* (1901) 194 Ill. 108, 62 N. E. 546; *Madison* v. *Guliford* (1911) 85 Conn. 55, 81 Atl. 1046, and reject declarations which do not accompany some act material to the issue, explaining or describing it. *Knox* v. *Montville* (1904) 98 Me. 493, 57 Atl. 792. The better doctrine, however, would permit such declara-

tions to be received regardless of their accompanying acts material to the issue, 4 Chamberlayne, Evidence, § 2665, although they would be accorded little weight if in fact contradicting the conduct of the declarant. See *Davis* v. *Adair* [1895] 1 Ir. 379; *Watson* v. *Simpson* (1858) 13 So. Ann. 337. In applying the rules governing domiciliary declarations to declarations concerning residence the principal case is clearly correct not only because of the ofttimes hazy distinction between domicil and residence, but also because the element of intent is required in both.

INSURANCE—ACCIDENT INSURANCE—SUNSTROKE—DISEASE—ACCIDENTAL MEANS.—An accident policy insured against death or disability through external, violent, and purely accidental means, provided that if sunstroke due to external, violent and accidental means should result, independently of all other causes, in the death of the insured, the insurer would pay the indemnity. The insured died in consequence of a sunstroke suffered while pursuing his usual vocation in an ordinary way. *Held,* the insurer is liable. *Bryant* v. *Continental Casualty Co.* (Tex. 1916) 182 S. W. 673.

While, in the popular mind, sunstroke is probably considered as an accident, nevertheless, sunstroke is ordinarily, perhaps universally, classified as a disease. Richards, Insurance (3rd ed.) 541; *Dozier* v. *Fidelity & Casualty Co.* (C. C. 1891) 46 Fed. 446. Accordingly, in the few cases involving the question, liability for sunstroke has been denied where the policy insured against bodily injuries incurred through accidental means, sunstroke not being specifically mentioned in the policy. *Sinclair* v. *Maritime Passengers' Assur. Co.* (1861) 3 E. & E. 478; *Dozier* v. *Fidelity & Casualty Co., supra.* In intimating that sunstroke is an accident, the principal case is clearly at variance with the weight of authority. Assuming that sunstroke is a disease, where a policy specifically insures against sunstroke due to accidental means, a difficult question arises as to what constitutes accidental means within the intent of the policy. Thus it is said that a result produced by means all of which were intended, cannot be said to be accidental because the result was different from what was expected. *Schmid* v. *Indiana Travellers' Accident Assn.* (1908) 42 Ind. App. 483, 85 N. E. 1032; *Appel* v. *Aetna Life Ins. Co.* (1903) 86 App. Div. 83, 83 N. Y. Supp. 238, aff'd. 180 N. Y. 514, 72 N. E. 1139. In accordance with this principle, some courts have taken the view that, under provisions similar to those in the instant case, the insurer is not liable where death was caused by sunstroke suffered by the insured while in the discharge of his ordinary vocation. *Semancik* v. *Continental Casualty Co.* (1914) 56 Pa. Super. Ct. 392; *Elsey* v. *Fidelity & Casualty Co.* (Ind. App. 1915) 109 N. E. 413. On the other hand, under a construction that accidental means are those which produce effects which are not their natural and probable consequences, 4 Cooley, Insurance, 2156; *United States Mut. Accident Assn.* v. *Barry* (1889) 131 U. S. 100, 121, 9 Sup. Ct. 755; *Western etc. Assn.* v. *Smith* (C. C. A. 1898) 85 Fed. 401, it has been intimated that sunstroke suffered under such conditions is accidental within the meaning of the policy. *Gallagher* v. *Fidelity & Casualty Co.* (1914) 163 App. Div. 556, 148 N. Y. Supp. 1016.

INSURANCE—POLICY INCONTESTABLE FROM DATE OF ISSUE—EFFECT OF FRAUD OF THE INSURED.—Plaintiff sued as beneficiary of a policy of

life insurance which contained a stipulation that the policy was incontestable from date, except for certain enumerated causes not including fraud in the procurement of the policy. The insurance company defended on the ground of fraud, and that the stipulation violated a statute providing that a life policy should be incontestable after two years from date of issue. *Held,* one judge dissenting, the stipulation did not violate the statute, and precluded the defendant from setting up the insured's fraud as a defence. *Duvall* v. *National Ins. Co. of Montana* (Idaho 1916) 154 Pac. 632.

A provision in a life insurance policy limiting contestability, except for specified causes not including the fraud of the insured, to a reasonable period after the date of the policy, is an incentive to promptness and vigilance on the part of the insurer in investigating the good faith of the insured; hence it is upheld by the courts as precluding the defence of fraud after the period has elapsed. *Drews* v. *Metropolitan Life Ins. Co.* (1910) 79 N. J. L. 398, 75 Atl. 167; *Massachusetts Benefit Life Assn.* v. *Robinson* (1898) 104 Ga. 256, 30 S. E. 918; *Indiana Nat. Life Ins. Co.* v. *McGinnis* (1913) 180 Ind. 9, 101 N. E. 289. Where, however, the policy provides that it shall be incontestable immediately upon issue, the insurer practically offers an inducement to misrepresentation and concealment by the insured, and the courts, refusing to give effect to a contract which is subversive of public morality, *cf. Ritter* v. *Mutual Life Ins. Co.* (1898) 169 U. S. 139, 154, 18 Sup. Ct. 300, 305, generally deny recovery upon the policy where it was procured through fraud. *Reagan* v. *Union Mut. Life Ins. Co.* (1905) 189 Mass. 555, 76 N. E. 217; see *New York Life Ins. Co.* v. *Weaver's Admr.* (1902) 114 Ky. 295, 70 S. W. 628; *Welch* v. *Union Cent. Life Ins. Co.* (1899) 108 Iowa 224, 78 N. W. 853; *contra, Patterson* v. *Natural P. M. Life Ins. Co.* (1898) 100 Wis. 118, 75 N. W. 980. In the principal case, furthermore, the stipulation was invalid since it violated the policy of the law, not only as declared by the courts, but as reaffirmed in legislative enactment. *New York Life Ins. Co.* v. *Hardison* (1908) 199 Mass. 190, 85 N. E. 410.

INTERSTATE COMMERCE ACT—FREE TRANSPORTATION—EFFECT ON PLAINTIFFS RIGHT TO RECOVER FOR INJURY.—Defendant in error was injured while on a train running from Mississippi to Tennessee. He had paid no fare but was on the tender by permission of the engineer, who had no authority to issue free transportation. *Held,* § 1 of the Interstate Commerce Act, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, making it unlawful, with certain exceptions, for any interstate common carrier to give free transportation and for any person other than those excepted to use "any such . . . interstate free transportation", rendered his presence on the train illegal. *Illinois Cent. R. R., Yazoo & Miss. Valley R. R., & Boothe* v. *Messina* (U. S. Sup. Ct., Oct. Term 1915, No. 535), reversing S. C. 67 So. 963.

The broad and liberal construction of the statute by the court seems to further the intention of the act, which was to prevent common carriers from granting free transportation and also to prevent persons from travelling from one state to another without paying the usual fare. *United States* v. *Williams* (D. C. 1908) 159 Fed. 310. In *United States* v. *Martin* (D. C. 1910) 176 Fed. 110, by a liberal construction of the word "use", the act was applied to cover the sale of a pass, lawfully issued in the first place, by a person not within the exception into whose hands it had come. The question whether

the relation of carrier and passenger arises in such a case of gratuitous passage is one of state law, and although the plaintiff's presence on the train is illegal under the act, that fact will not deprive him of the protection required by local law. *Southern Pac. Co.* v. *Schuyler* (1913) 227 U. S. 601, 33 Sup. Ct. 277. According to the weight of authority, the illegality of the plaintiff's presence will not prevent recovery, on the ground that his rights do not depend on the illegal pass, but arise from the fact that the company is under a duty, imposed by public policy, toward any human being of whose safety as a passenger it has taken charge. *Gabbert* v. *Hackett* (1908) 135 Wis. 86, 115 N. W. 345; *Schuyler* v. *Southern Pac. Co.* (1910) 37 Utah 581, 109 Pac. 458; *McNeill* v. *Durham & C. R. R.* (1904) 135 N. C. 682, 47 S. E. 765. In the principal case, the plaintiff was not a passenger but a tresspasser, or at most a licensee, but there was also evidence of wanton negligence; hence the fact that he was violating the law should not prevent recovery for his injury.

NEGLIGENCE—MANUFACTURER—LIABILITY TO PERSONS HAVING NO CONTRACTUAL RELATIONS.—The defendant, a manufacturer of automobiles, sold one to a retail dealer who sold it to the plaintiff. Due to a defective wheel, which the defendant negligently failed to inspect, the plaintiff was thrown out and injured. *Held,* as the defendant should have foreseen that his negligence would result in an injury to the user of the automobile, the plaintiff can recover. *McPherson* v. *Buick Motor Co.* (N. Y. Ct. of App. 1916) 54 N. Y. L. J. 2339.

The liability of a manufacturer for his negligence, to parties having no contractual relations with him, is discussed in 2 Columbia Law Rev., 58, 105, 268; 4 *id.* 144; 5 *id.* 67; 7 *id.* 437; 13 *id.* 264. In numerous recent cases, the principles involved in this question have been applied, either in allowing recovery, *Krahn* v. *J. L. Owens Co.* (1914) 125 Minn. 33, 145 N. W. 626; *Thornhill* v. *Carpenter-Morton Co.* (1915) 220 Mass. 593, 108 N. E. 474, or in denying it. *Burkett* v. *Studebaker Bros. Manufacturing Co.* (1912) 126 Tenn. 467, 150 S. W. 421; *cf. Wood* v. *Sloan* (N. M. 1915) 148 Pac. 507. In a few recent suits brought against the manufacturers of automobiles for injuries to the users thereof caused by defective construction, similar considerations were held to determine the defendants' liability, *Olds Motor Works* v. *Shaffer* (1911) 145 Ky. 616, 140 S. W. 1047, or freedom from liability. *Cadillac Motor Car Co.* v. *Johnson* (C. C. A. 1915) 221 Fed. 801. There is, however, a noticeable tendency to increase the class of objects in reference to which mere negligence renders the manufacturer liable, *Ketterer* v. *Armour & Co.* (D. C. 1912) 200 Fed. 322; *Mazetti* v. *Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633, and the principal case, like a previous New York decision relating to automobiles, *Quackenbush* v. *Ford Motor Co.* (1915) 167 App. Div. 433, 153 N. Y. Supp. 131, represents a commendable extension of the doctrine of these cases.

NEGOTIABLE INSTRUMENTS — CHECK PAYABLE TO FICTITIOUS PAYEE — EFFECT.—Through the fraud of its agent, the plaintiff drew a check on the defendant bank payable to the order of a fictitious person. The check was indorsed in the name of the payee, presented to the bank and paid. The plaintiff now seeks to recover the amount. *Held,* the agent's knowledge of the fictitious character of the payee is imputed to the principal; hence the check was payable to bearer, and

the defendant is not liable. *Equitable Life Assur. Soc.* v. *National Bank of Commerce* (Mo. 1916) 181 S. W. 1176.

By the common law, both in England and in America, if the payee was fictitious, the bill was deemed payable to bearer only as against parties with knowledge of that fact. *Gibson* v. *Minet* (1791) 1 H. Bl. 569; *Bennett* v. *Farnell* (1807) 1 Camp. 130, 180 c.; *Armstrong* v. *National Bank* (1889) 46 Ohio St. 512, 22 N. E. 866; see *Shipman* v. *Bank of the State of N. Y.* (1891) 126 N. Y. 318, 27 N. E. 371; Story, Bills of Exchange (3rd ed.) §§ 56, 200; *contra, Kohn* v. *Watkins* (1882) 26 Kan. 691; 1 Daniel, Negotiable Instruments (6th ed.) § 139; see *Lane* v. *Krekle* (1867) 22 Iowa 399. But in England, the Bills of Exchange Act (1882) 45 and 46 Vict. c. 61, § 7 (3) altered that rule so that such instruments are payable to bearer regardless of whether the maker knew that the payee was fictitious. Chalmers, Bills of Exchange (7th ed.) pp. 22-25; *Bank of England* v. *Vagliano Bros.* [1891] App. Cas. 107; *cf. Macbeth* v. *North & South Wales Bank* (1906) 2 K. B. 718, [1908] App. Cas. 137. On the other hand, the Negotiable Instruments Law, now generally adopted in the United States, codifies the common law rule, and treats the bills as payable to bearer only when the maker knows the payee is fictitious. Negotiable Instruments Law, § 28, (N. Y. § 28); *Snyder* v. *Corn Exchange Nat. Bank* (1908) 221 Pa. 599, 70 Atl. 876; *Harmon* v. *Old Detroit Nat. Bank* (1908) 153 Mich. 73, 116 N. W. 617; see *Boles* v. *Harding* (1909) 201 Mass. 103, 87 N. E. 481. The knowledge of an agent cannot be imputed to the principal where the agent is acting adversely to the principal, and this is generally true where the principal is a corporation. 2 Mechem, Agency (2nd ed.) §1815 *et seq.*, § 1825; see 15 Columbia Law Rev., 710. Since the agent in the instant case committed the fraud in his own interest, and thus acted adversely to his principal, his knowledge that the payee was fictitious could not be imputed to the principal, and hence the decision seems erroneous.

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENTS.—The defendant was sued on a promissory note as maker. The payee had transferred the note to the plaintiff before maturity by indorsing thereon, "Payment guaranteed; protest waived". *Held,* this constituted an indorsement, and since the plaintiff was a holder in due course, he was protected from defenses good between the original parties. *Mangold & Glandt Bank* v. *Utterback* (Okla. 1916) 154 Pac. 533.

An assignee of a negotiable instrument can only acquire the rights of his assignor, but an indorsee for value without notice, and before maturity, can acquire a title free from certain equities arising between the prior parties. See *Trust Co.* v. *Nat. Bank* (1879) 101 U. S. 68. In spite of this rule, when a transferor writes, "I assign", on the back of a note, it is held he intended to assume liability as indorser and pass title in the commercial sense. *Markey* v. *Corey* (1895) 108 Mich. 184, 66 N. W. 493; *Davidson* v. *Powell* (1894) 114 N. C. 575, 19 S. E. 601. Where the transferor assigns his right, title, and interest, the negotiable character of the note is not destroyed and the writing constitutes a commercial indorsement; *Lenhart* v. *Ramey* (1888) 3 Ohio C. C. 135; *Citizens Nat. Bank* v. *Walton* (1898) 96 Va. 435, 31 S. E. 890; *Evans* v. *Freeman* (1906) 142 N. C. 61, 54 S. E. 847; *contra, Aniba* v. *Yeomans* (1878) 39 Mich. 171; *De Hass* v. *Roberts* (C. C. 1894) 59 Fed. 853; *Gale* v. *Mayhew* (1910) 161 Mich. 96, 125 N. W. 781; but a guaranty written on the back of a note does not convey a

title free from equities arising between the original parties. *Edgerly* v. *Lawson* (1900) 176 Mass. 551, 57 N. E. 1020; *Trust Co.* v. *Nat. Bank, supra; cf. Brown* v. *Curtiss* (1849) 2 N. Y. 225. Since notice of protest and demand on the party primarily liable are not necessary for a recovery against a guarantor, it would seem that the transferor intended to assume an enlarged liability as indorser where he guarantees payment, waiving protest and demand. *German-American Sav. Bank* v. *Hanna* (1904) 124 Iowa 374, 100 N. W. 57; *cf. Dunham* v. *Peterson* (1896) 5 N. D. 414, 67 N. W. 293; *contra, Ireland* v. *Floyd* (1914) 42 Okla. 609, 142 Pac. 401. As the Negotiable Instruments Law, § 63, (N. Y. § 113) provides that a person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be indorser unless he indicates clearly his intention to be bound in another capacity, the conclusion reached in the instant case is clearly sound. *Cf. Fansworth* v. *Burdick* (1915) 94 Kan. 749, 142 Pac. 863.

NEGOTIABLE INSTRUMENTS—PAYMENT TO UNAUTHORIZED AGENT—MISAPPROPRIATION—RECOVERY BY PAYEE.—Plaintiff sued for goods sold and delivered. It appeared that defendant had given a check for the amount due to the plaintiff's salesman, who, without authority, had indorsed plaintiff's name, cashed the check, and kept the proceeds. *Held,* the payee may recover from the maker as a debtor. *Siegel* v. *Kovinsky* (Sup. Ct., App. Term, 1916) 157 N. Y. Supp. 340.

To extinguish the debt the check must be accepted in payment and in due course be actually paid. *Bernheimer* v. *Herrman* (N. Y. 1887) 44 Hun 110. Since the maker of a negotiable instrument can satisfy it only by payment to the owner or the owner's authorized agent, *Marling* v. *Nommensen* (1906) 127 Wis. 363, 106 N. W. 844, and as the true owner's title to the check remains the same after an unauthorized or forged indorsement, he may recover the amount of the check as his property from a bank paying on such an indorsement, *Robinson* v. *Bank of Winslow* (1908) 42 Ind. App. 350, 85 N. E. 793; *Knoxville Water Co.* v. *East Tennessee Nat. Bank* (1910) 123 Tenn. 364, 131 S. W. 447, or usually from a maker paying under such circumstances. *Thomson* v. *Bank of British North America* (1880) 82 N. Y. 1; *Lochenmeyer* v. *Fogarty* (1884) 112 Ill. 572, 581. Some courts take the view that payment of a check delivered to an agent authorized to collect money and receive checks extinguishes the debt, even though the agent wrongfully indorsed the check and misappropriated the funds. The theory is that the loss ought to fall on the payee, who designated the agent to receive the check and thus put him in a position to perpetrate the fraud, rather than on the maker, who had no voice in selecting the agent and is in no way responsible for his acts. *McFadden* v. *Follrath* (1911) 114 Minn. 85, 130 N. W. 542; *Morrison* v. *Chapman* (1913) 155 App. Div. 509, 140 N. Y Supp. 700. But the principal case, in taking the opposite view, is in accord with the weight of authority. *Bernheimer* v. *Herrman, supra*; *Lochenmeyer* v. *Fogarty, supra; Thomson* v. *Bank of British North America, supra.*

OFFICERS—ILLEGAL REDUCTION OF SALARY—RELEASE—ACCEPTANCE OF REDUCED SALARY AS WAIVER.—The salary of architectual draftsman in the Department of Education is fixed by the Board of Alderman at $35 a week. The plaintiff, appointed to the office by defendant, was paid $30 a week for several years, and then raised to the pay fixed by

law. He thereupon sued for the arrears. The defendant set up a release, the consideration for which was the increase in plaintiff's pay, and also pleaded that plaintiff had waived his claim. *Held,* the release was void and the acceptance of the reduced salary did not operate as a waiver. *Pitt* v. *Board of Education* (N. Y. 1915) 110 N. E. 612.

The right of a public officer to his compensation is not created by contract, but belongs to him as an incident of his office, attached thereto by law. Throop, Public Officers, § 443. Hence a board of officials, invested merely with the right to make its own appointments, is powerless to make any change in the compensation of its appointees. Throop, *supra,* § 456; *Hogan* v. *Board of Education* (1911) 200 N. Y. 370, 93 N. E. 951; *cf. Riley* v. *Mayor etc. of N. Y.* (1884) 96 N. Y. 331. The power to fix the salary attached to plaintiff's office is not among the privileges conferred by statute upon the defendant. 8 Consol. Laws of N. Y. (1910) Ch. 16, § 310; see *Hogan* v. *Board of Education, supra.* Therefore, defendant's action in increasing plaintiff's pay to the amount fixed by law was merely the performance of defendant's legal duty and could not furnish a consideration for plaintiff's release, *Hale* v. *Dressen* (1899) 76 Minn. 183, 78 N. W. 1045; *Richmond & Danville R. R.* v. *Walker* (1893) 92 Ga. 485, 17 S. E. 604; *Early* v. *Burt* (1886) 68 Iowa 716, 28 N. W. 35, if, indeed, the release was not otherwise void as against public policy. *Cf. Purdy* v. *City of Independence* (1888) 75 Iowa 356, 39 N. W. 641; *Lancaster County* v. *Fulton* (1889) 128 Pa. 48, 18 Atl. 384; Mechem, Public Officers, § 377. Finally, the plaintiff's acceptance of the diminished salary and performance of the duties of the office did not constitute a waiver of the claim nor raise an estoppel against the plaintiff, since the courts will not allow an illegal result to be achieved by indirect means. *Kehn* v. *State* (1883) 93 N. Y. 291; *Bowe* v. *City of St. Paul* (1897) 70 Minn. 341, 73 N. W. 184; *Glavey* v. *United States* (1900) 182 U. S. 595, 609, 21 Sup. Ct. 891, 896.

PARENT AND CHILD—CONTRACTS—COMPENSATION FOR SERVICES RENDERED BY MEMBER OF FAMILY.—The plaintiff obtained a judgment against her mother's estate for board and services rendered to the mother during her life. Upon appeal by the executor, *held,* besides evidence of an express contract, there were other facts showing an agreement to pay sufficient to take the case to the jury. *LeCount* v. *Fountain's Estate.* (Mo. 1916) 182 S. W. 102.

In action by an executor to recover a sum of money from the testatrix's daughter, the latter filed a counterclaim for services rendered to the mother upon an alleged express contract. *Held,* evidence of the contract was not sufficient to take the case to the jury. *Bishop* v. *Newman's Ex'r.* (Ky. 1916) 182 S. W. 165.

At common law a child was under no legal obligation to support a parent, and it should be noticed that statutes creating this duty refer only to those persons who, through disability, are likely to become a charge upon the community. Schouler, Domestic Relations (5th ed.) § 265; Battershall, Domestic Relations, 398; see *Duffy* v. *Yodi* (1906) 149 Cal. 140, 84 Pac. 838. In other cases, there is no difficulty, generally speaking, in upholding an express contract between members of the same family, even when the relationship is that of parent and child. Tiffany, Domestic Relations (2nd ed.) 307. But the broad rule that whenever service is rendered and accepted, a contract to pay therefor will be presumed, 2 Parsons, Contracts (9th ed.) *46; see

Wood v. *Lewis' Estate* (1914) 183 Mo. App. 553, 562, 167 S. W. 666, is largely qualified when the parties are related by blood or marriage, or live together under similar circumstances. The fact of such relationship may serve merely to take away the presumption that would obtain if the parties were strangers, *Spring* v. *Hulett* (1870) 104 Mass. 591; *In Re Pauly's Estate* (Iowa 1916) 156 N. W. 355; see *Guild* v. *Guild* (1833) 32 Mass. 129, or it may create, as pointed out in the second principal case, a positive presumption that the services were gratuitous. *Lansing* v. *Gregory* (1915) 128 Minn. 496, 151 N. W. 277; *Heffron* v. *Brown* (1895) 155 Ill. 322, 40 N. E. 583; *Wood* v. *Lewis' Estate, supra.* A few jurisdictions demand that an express contract be shown, *Hinkle* v. *Sage* (1902) 67 Ohio St. 256, 65 N. E. 999; *Murphy* v. *Murphy* (1890) 1 S. D. 316, 47 N. W. 142; *Tyler* v. *Burrington* (1876) 39 Wis. 376, but a majority of the courts allow a recovery when a contract may clearly be implied from all the circumstances. *McGarvy* v. *Roods* (1877) 73 Iowa 363, 35 N. W. 488; *Lansing* v. *Gregory, supra*; *Heffron* v. *Brown, supra.*

PLEADING AND PRACTICE—DETINUE—SCOPE OF GENERAL ISSUE.—In an action of detinue for a note, *semble,* the plea of *non detinet* puts in issue both plaintiff's property in the note and defendant's detention of it. *Malone* v. *Davis* (W. Va. 1915) 86 S. E. 1100.

Following the rule of the common law, *Philips* v. *Robinson* (1827) 4 Bing. 106, courts in this country, both under statute and independent thereof, have uniformly held that the general issue in detinue includes within its scope not only the fact of the detention by the defendant, but also the plaintiff's property or right to immediate possession. *Robinson* v. *Peterson* (1891) 40 Ill. App. 132; *Bolton* v. *Cuthbert* (1902) 132 Ala. 403, 31 So. 358; *Snellgrove* v. *Evans* (1906) 145 Ala. 600, 40 So. 567; but *cf. Chappell* v. *Falkner* (1914) 11 Ala. App. 382, 66 So. 890. Accordingly, proof that the plaintiff's title has been lost by adverse possession, *Elam* v. *Bass's Executors* (1814) 18 Va. 301; *Smart* v. *Baugh* (1830) 26 Ky. *363; *Lay's Exr.* v. *Lawson's Admr.* (1853) 23 Ala. 377, 392, or that it was fraudulently obtained, *Stratton* v. *Minnis* (1811) 16 Va. 329, or that the debt secured by the mortgage under which the plaintiff claims has been paid, *Pinckard & Lay* v. *Bramlett* (1910) 165 Ala. 327, 51 So. 557, may be given in evidence under the plea of *non detinet.* On the other hand, the defendant cannot, under the general issue, prove that his detention is justified, *Richards* v. *Frankum* (1840) 6 Mees. & W. *420, as, for instance, that he has a lien on the goods, Co. Lit. *283a; see *Philips* v. *Robinson, supra,* or that he acted under legal process, *Cromwell* v. *Clay* (1833) 31 Ky. *578; *Daniel* v. *Hardwick* (1889) 88 Ala. 557, 7 So. 188, but he must plead these defenses specially. Defenses arising after the institution of the suit are inadmissible under this plea; the proper plea is *puis darrein continuance. Brown* v. *Brown* (1848) 13 Ala. 208; *Whitfield* v. *Whitfield* (1870) 44 Miss. 254. In England and Canada, by the Hilary Rules of 1834, 5 B. & Ad. Appendix ix, the scope of *non detinet* was restricted to a denial of the detention, so it no longer includes a denial of the plaintiff's property. See *Reynolds* v. *Waddell* (1854) 12 U. C. Q. B. 9; Stephen, Pleading, *177.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—SUIT IN THIRD STATE—REMOVAL TO DEFENDANT'S DISTRICT.—The plaintiff, a citizen of Montana, sued two defendants, citizens of Wisconsin, in the State Court

of Minnesota. The defendants removed to a United States District Court in Wisconsin, on the ground of diverse citizenship, and the plaintiff moved to remand. *Held,* the motion should be granted. *Eddy* v. *Chicago & N. W. Ry.* (D. C., W. D., Wis. 1915) 226 Fed. 120.

Where a citizen of one State sues a citizen of a second in the State courts of a third, the Supreme Court has held that the cause is not removable to the Federal court for the district in which the suit is pending, on the ground that the Federal court for that district would not have had original jurisdiction of the suit. *Ex parte Wisner* (1906) 203 U. S. 449, 27 Sup. Ct. 150. Prior to this decision, some of the Federal courts had allowed removal, *Burck* v. *Taylor* (C. C. 1889) 39 Fed. 581, while others had denied it. See *Foulk* v. *Gray* (C. C. 1902) 120 Fed. 156. This doctrine apparently rests on a confusion betweeen the general jurisdiction of the district courts, and the provisions as to the place of bringing a given suit; *Louisville & N. R. R.* v. *Western Union Telegraph Co.* (D. C. 1914) 218 Fed. 91; and in a later case the Supreme Court has held that the plaintiff may waive his objections to the jurisdiction. *Matter of Moore* (1908) 209 U. S. 490, 28 Sup. Ct. 585; see 9 Columbia Law Rev., 545. But decisions like the principal case have further held that such suit is not removable to the Federal court of the district of the defendant's residence, by construing § 29 of the Judicial Code (1911) 36 Stat. 1095, to mean that a suit may be removed only into the district court of the district where such suit is pending. *St. John* v. *United States Fidelity, etc., Co.* (D. C. 1914) 213 Fed. 685; *Pavick* v. *Chicago M. & St. P. Ry.* (D. C. 1914) 225 Fed. 395; *St. John* v. *Taintor* (D. C. 1915) 220 Fed. 457; *contra* (on the ground that the section is merely procedural, and not exclusive), *Stewart* v. *Cybur Lumber Co.* (D. C. 1914) 211 Fed. 343; *Park Square Automobile Station* v. *American Locomotive Co.* (D. C. 1915) 222 Fed. 979; see *Mattison* v. *Boston & M. R. R.* (D. C. 1913) 205 Fed. 821. As the statute provides that only a non-resident defendant may remove, under the restrictive view the suit cannot be removed, without the consent of the plaintiff, when it is brought in a third State, but only when it is brought in the State court situated in the district of the plaintiff's residence, and then only to the district court of that district. It is hardly conceivable that Congress contemplated this result.

SALES—STANDING TIMBER—REVERSION OF TITLE.—The plaintiff claimed title to certain timber which the defendants had conveyed to his assignors by a deed which also authorized the grantees and their assignees to enter upon the defendants' land for the purpose of cutting and removing the timber. In an action to restrain defendants from cutting the trees, *held,* one judge dissenting, a fee simple estate in the trees was conveyed and title did not revert to the grantors after a reasonable time for cutting and removing had elapsed. *Chapman* v. *Dearman* (Tex. Civ. App. 1915) 181 S. W. 808. See Notes, p. 412.

SPECIFIC PERFORMANCE—HARDSHIP—EVENTS SUBSEQUENT TO THE MAKING OF THE CONTRACT.—A tenant brought a bill for specific performance of an option to renew in a lease providing for renewal on the same terms and conditions. Subsequent to his election to renew, the landlord, also the owner of a lot adjoining the leased premises, discovered a drain running from the former under the latter, and refused to

renew except upon the insertion in the lease of a provision to the effect that such renewal should not create any easement unless such easement legally existed prior to the renewal. The court *held* for the landlord. *Humpfner* v. *Beers* (N. Y. App. Div., 1st Dep't, 1916) 157 N. Y. Supp. 345. See Notes, p. 410.

TRADE-MARKS AND TRADE NAMES—NATURE AND EXTENT OF THE RIGHT IN TRADE-MARKS.—The plaintiff sought to restrain the use of his trade-mark by the defendant in Kentucky, to which territory the plaintiff had not extended his business. *Held,* the use by the defendant would not be restrained. *Allen & Wheeler Co.* v. *Hanover Star Milling Co.* (U. S. Supreme Court, Oct. Term 1915, No. 30, March 6, 1916). See Notes, p. 416.

WILLS—CONSTRUCTION—ERRONEOUS DESCRIPTION.—The testator's will purported to give forty-seven acres of land to his wife and daughter. The will described as the devise, a small tract of seven acres and "the south half of the south half of the northeast quarter". The latter area included twenty acres not owned by testator and so gave the wife and daughter only twenty-seven acres, twenty of which were also given by a subsequent clause to remaining children. The will when so read left deceased intestate as to forty acres, the south half of the south half of the northwest quarter contiguous to the seven acres. *Held,* it was proper to construe the will as if the word "north-west" was written therein instead of "north-east", thereby harmonizing all provisions and passing the whole estate. *Mudd* v. *Cunningham* (Mo. 1915) 181 S. W. 386.

The intention of the testator as gathered from the will in its entirety is to govern. *Stewart* v. *Jones* (1909) 219 Mo. 614, 118 S. W. 1; see *Yates* v. *Shern* (1901) 84 Minn. 161, 86 N. W. 1004. But where the language is ambiguous the court will endeavor to construe the instrument so as to form one consistent whole. *Matter of Title G. & T. Co.* (1909) 195 N. Y. 339, 88 N. E. 375. If not contrary to its express terms the will, if possible, should be so construed as to avoid intestacy in whole or in part. *Boehm* v. *Baldwin* (1906) 221 Ill. 59, 77 N. E. 454; *Miners* v. *Miners* (1904) 179 Mo. 614, 78 N. W. 795. Facts and circumstances surrounding testator at the time he made the will may be shown to aid the court in its construction, where the language of the will is ambiguous, see *Morris* v. *Sickly* (1892) 133 N. Y. 456, 31 N. E. 332, or where there is a latent ambiguity. See *Patch* v. *White* (1886) 117 U. S. 210, 6 Sup. Ct. 617. If the ambiguity consists of a misdescription this can be stricken out; and if enough remains to identify the person or thing, the gift is good. 1 Roper, Legacies (4th ed.) 297; *Patch* v. *White, supra;* see *Finlay* v. *Kings' Lessee* (1885) 28 U. S. 346, 377. But words of correct description cannot be written into a will; and if testator's intention is not disclosed from the will and admissible surrounding facts, independently of the omission or mistake, the gift will fail. *Hawman & Wife* v. *Thomas' Ex'r.* (1875) 44 Md. 30. In the principal case if "east" is stricken from "north-east" the misdescription is removed and enough remains to show that testator intended the southern part of the northwest quarter to go to his wife and daughter. It is unnecessary under the holding of the court in the principal case, which seems correct, to

regard anything as having been written into the will. *Whitehouse* v. *Whitehouse* (1907) 136 Iowa 165, 113 N. W. 759.

WILLS—DEVISE TO CHURCH—STATUTORY RESTRICTION ON CAPACITY OF CHURCH TO HOLD PROPERTY.—The testatrix devised three hundred and ten acres of land in remainder to a church. Under Ky. Stat. § 319, no church is capable of taking or holding title to more than fifty acres. *Held,* such devise was effectual to give the church title to fifty acres of the land. *Compton* v. *Moore* (Ky. 1916) 181 S. W. 360.

While it has been held that a devise to a corporation, in excess of the amount which it is authorized to hold, can be attacked only in a direct proceeding by the state, *Farrington* v. *Putnam* (1897) 90 Me. 405, 37 Atl. 652; see *Jones* v. *Habersham* (1882) 107 U. S. 174, 188, the validity of such a devise, according to the weight of authority, may be questioned by a person whose interests will be affected by the transgression of the power of the corporation. *Matter of McGraw* (1888) 111 N. Y. 66, 19 N. E. 233; *House of Mercy* v. *Davidson* (1897) 90 Tex. 529, 39 S. W. 924. In the jurisdictions which follow the latter holding, a devise to a corporation, which already holds property to the limit of its capacity, fails absolutely. *Matter of McGraw, supra*; *House of Mercy* v. *Davidson, supra*; *cf. Cromie's Heirs* v. *Louisville Orphan's Home Society* (1867) 66 Ky. 365. Under statutes which restrict the power of a testator to leave property by will to a charitable institution, where the testator attempts to leave a greater amount, the courts, in trying to give effect to the legacy as far as possible, hold that the institution is entitled to the statutory allowance. *In re Peabody's Estate* (1908) 154 Cal. 173, 97 Pac. 184; see *Paschal* v. *Acklin* (1863) 27 Tex. 173, 196; *cf. Montgomery* v. *Millikin* (1845) 13 Miss. 151; *contra, Kelley* v. *Welborn* (1900) 110 Ga. 540, 35 S. E. 636. Similarly, where the capacity of the corporation to hold property is restricted, and the corporation does not hold up to the limit, the sound rule would seem to be that it is entitled to so much of the property as it is by statute allowed, in the absence of a clear intent on the part of the testator to pass the gift as a whole or not at all. *Wood* v. *Hammond* (1889) 16 R. I. 98, 17 Atl. 324; *Chamberlain* v. *Chamberlain* (1871) 43 N. Y. 424, 439.

WILLS—REVOCATION—PRESUMPTION—DECLARATIONS OF TESTATOR.—In probate proceedings to prove a lost will the declarations of the testator were offered to rebut the presumption of revocation. *Held,* the declarations were admissible. *In re Keen's Estate* (Mich. 1915) 155 N. W. 514.

Where it is proved that a will was made and the testator retained custody of it or had ready access to it, the presumption arises, if the will cannot be found after his death, that he destroyed it *animo revocandi,* 1 Schouler, Wills, Executors and Admrs. (5th ed.) § 402, but by the weight of authority such presumption may be rebutted by the declarations of the testator. *In Matter of Johnson's Will* (1874) 40 Conn. 587; *Sugden* v. *St. Leonard* (1876) L. R. 1 P. D. 154; *cf. Aldrich* v. *Aldrich* (1913) 215 Mass. 164, 102 N. E. 487. This is clearly an exception to the hearsay rule, 3 Wigmore, Evidence § 1736, for which there is said to be as much justification as for the rule admitting statements of relatives in pedigree cases. *In re Miller's Will* (1907) 49 Ore. 452, 90 Pac. 1002. But according to another theory it is pos-

sible to admit the declarations of a testator without breaking the hearsay rule. By this theory the declarations are evidence of a belief of the declarant which may be considered as circumstantial evidence of sufficient weight to establish the existence of the will. 1 Greenleaf, Evidence (16th. ed.) 260; see *Jackson* v. *Hewlett* (1913) 114 Va. 573, 77 S. E. 518. The fear of unreliability of such declarations goes to their weight and not to their admissibility. *Patterson* v. *Hickey* (1861) 32 Ga. 156. The New York rule is sometimes said to exclude such declarations because they are mere hearsay, but the rule in this jurisdiction is due to a statute which requires that a will must be proved to have been in existence at the death of the testator or fraudulently destroyed in his life time before it can be probated as a lost will, N. Y. Code Civ. Proc. § 1865, and the declarations of the testator to rebut the presumption of revocation are not competent to prove the statutory requirement of the existence of the will. *Matter of Kennedy* (1901) 167 N. Y. 163, 60 N. E. 442.